89-1048

No. 89-3226

In The

Supreme Court of the United States

October Term, 1989

FMC CORPORATION,

Petitioner,

vs.

CYNTHIA ANN HOLLIDAY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 514 (A)-(B) of the Employee Retirement Income Security Act of 1974 allows FMC Corporation's self-funded employee welfare benefit plan to avoid the effect of a Pennsylvania insurance statute abolishing the common law remedy of subrogation as to all entities which provide medical benefits to victims of motor vehicle accidents?

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STATUTES INVOLVED

In addition to the statutes cited in the Petition for Writ of Certiorari, Section 1719 of the Pennsylvania Motor Vehicle Financial Responsibility Law of 1984 ("Motor Vehicle Law") provides

> § 1719. Coordination of benefits
>
> (a) General rule. – Except for worker's compensation, a policy of insurance issued or delivered pursuant to this subchapter shall be primary. Any program, group contract or other arrangement for payment of benefits such as described in Section 1711 (relating to required benefits) 1712(1) and (2) (relating to availability of benefits) or 1715 (relating to availability of adequate limits) shall be construed to contain a provision that all benefits provided therein shall be in excess of and not in duplication of any valid and collectible first party benefits provided in Section 1711, 1712 or 1715 or workers' compensation.
>
> (b) Definition. – As used in this section the term "program, group contract or other arrangement" includes, but is not limited to, benefits payable by a hospital plan corporation or a professional health service corporation subject to 40 Pa.C.S. Ch. 61 (relating to hospital plan corporations) or 63 (relating to professional health services plan corporations).

STATEMENT OF THE CASE

As noted in FMC's statement of the facts, Cynthia Ann Holliday was entitled to medical benefits under the FMC Salaried Health Plan as of January 16, 1987. (App. 6A, 7A, 87A). Ms. Holliday was critically injured in an

automobile accident on that date, having suffered massive head injuries which have resulted in permanent impairment. Her medical expenses to date exceed $178,000.00; the cost of future care is unknown. (App. 7A, 87A, 103A).[1]

The plan provides for coordination of benefits between first-party automobile coverage and the Plan as follows:

> If you or a covered member of your family are eligible to receive benefits under another group medical plan, Health Maintenance Organization (HMO), government plan, or by "no-fault" automobile insurance which provides medical coverage, you may be eligible for benefits from those Plans and your FMC Plan. In the case of coverage by "no-fault" automobile insurance, FMC will pay covered expenses not paid for by no-fault insurance.
>
> (App. 58A)
>
> *No-Fault*
>
> In some states with no-fault motor vehicle coverage, the carrier is the primary insurer in these jurisdictions. All medical expenses related to an accident must be submitted to the carrier and not the FMC Health Care Plan. Eligible expenses not paid for by no-fault insurance *will* be paid by the FMC Plan.
>
> (App. 62A)

In accordance with the coordination of benefits and "no-fault" language of the Plan, the first $10,000.00 in

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[1] All citations labeled "App." are to the appendix filed to the brief of FMC which was docketed with the Third Circuit Court of Appeals.

medical bills were paid by the State Farm Mutual Automobile Insurance Company under a motor vehicle insurance policy owned by Mr. Holliday on the date of the accident. (App. 217A-219A). The Plan availed itself of the coordination of benefits and no-fault clauses,[2] commencing payment of medical bills only after State Farm's coverage was exhausted. (App. 220A-222A). Significantly, although Ms. Holliday's bills were well in excess of the $100,000.00 threshold required for eligibility under the Pennsylvania Catastrophic Loss Trust Fund, Act of February 12, 1984, P.L. 26, 11-12, 75 Pa.C.S.A. Sections 1761-1769, (App. 223A-224A), and the Plan provides a one million dollar lifetime maximum per person (App. 15A), the Plan paid no expenses which qualified for Catastrophic Loss Trust Fund coverage.

FMC's Statement of Facts correctly recites a portion of the clause which purports to reserve subrogation rights to the Plan and further correctly notes that Mr. Holliday signed a third-party reimbursement form presented to him by an FMC representative under the authority of this provision. However, Mr. Holliday did so as a result of the final sentence of the subrogation clause contained in the Plan, which presents a Hobson's Choice to the beneficiary:

> Unless you sign the Company's "third party reimbursement form", the claims administrator will not process any claim where there is possible liability on behalf of a third-party. (App. 63A).

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[2] These clauses parrot Pennsylvania's Motor Vehicle Law in this regard. See *Statutes Involved, supra.*

Mr. Holliday then commenced the civil action as described in FMC's Statement of Facts. On September 3, 1987, President Judge Robert C. Earley of the Common Pleas Court of Indiana County, Pennsylvania, entered an Order granting the Petition of the tortfeasor to interplead his automobile liability insurance policy limit of $100,000.00 and directed all potential plaintiffs to make claims against such funds. (App. 184A-192A). On May 2, 1989, an Order was entered approving a settlement by and between Ms. Holiday, three other individuals who made claim against the liability insurance proceeds in response to the interpleader, and the tortfeasor, the effect of which was to limit Cynthia Ann Holliday's recovery from the tortfeasor to $49,875.50, plus accrued interest. (Petition for Writ of Certiorari, Page 5).

FMC notified Ms. Holliday of its intent to exercise subrogation rights with respect to the Indiana County action. Ms. Holliday refused to acknowledge the subrogation claim of FMC, citing Section 1720 of the Motor Vehicle Law. FMC then instituted a declaratory judgment action in the United States District Court for the Western District of Pennsylvania (Civil Action Number 88-1098), asserting a right of subrogation under the language of the Plan.

Upon cross-motions for summary judgment, the Honorable Alan N. Bloch granted Ms. Holliday's Motion for Summary Judgment and denied that of FMC.

The United States Court of Appeals for the Third Circuit affirmed the District Court in all respects. The Third Circuit, having conducted an exhaustive analysis of

the congressional intent underlying the various provisions of Section 514 of ERISA, held that Congress did not intend to preempt legitimate state regulations which do not operate to undermine the congressional purposes underlying the preemption clause. The Court found the anti-subrogation provision of the Motor Vehicle Law to be such a state regulation, and determined that Congress did not intend Section 514 of ERISA to preempt that Act of the Pennsylvania Legislature.

SUMMARY OF ARGUMENT

For many reasons, the Court should not accept this case for review.

First, the Third Circuit Court of Appeals was correct that Pennsylvania's coordination of benefit laws should not be preempted merely because such laws have a tangental effect upon ERISA plans. In so holding, the Third Circuit is in concert with, and has followed, an equally cogent and well-reasoned opinion out of the Sixth Circuit. *Northern Group Services, Inc. vs Auto Owners Insurance Co.*, 833 F.2d 85 (6th Cir. 1987) cert. denied, 108 S.Ct. 1754 (1988), held that the proper inquiry under the deemer clause is whether the state insurance regulation intentionally or unintentionally addresses a core type of ERISA matter which Congress sought to protect by the preemption provision. The Third Circuit opinion conflicts only with an earlier result reached by the Ninth Circuit through a truncated analysis of the specific issue presented for decision. The other cases cited by FMC in its

attempt to construct a serious conflict are highly distinguishable on their essential facts, and lend nothing to an analysis of the importance (or lack thereof) of FMC's plea. The minor conflict which does exist is neither worthy of this Court's attention nor soluble by a review of this case.

Second, the Petition for Certiorari rests heavily on dicta found in *Metropolitan Life Insurance Co. vs. Massachusetts*, 471 U.S. 724 (1985). FMC asserts that this dicta categorically exempts from state automobile insurance regulation all self-funded employee benefit programs. Such flawed reasoning is rooted in no holding of this Court, ignores the approach uniformly applied by this Court in preemption cases, and fails when viewed in the context of the legislative history which underlies Section 514.

This Court has been repeatedly called upon or requested to review and decide questions of federal preemption under ERISA. This Court should not accept or open its door to automatic preemption of state law as the vehicle for resolution of every conceivable conflict arising between state laws and an ERISA plan. The maintenance of a federal system of government precludes adoption of so-called "bright line" tests which trample the will of Congress. The case at bar is inappropriate for Supreme Court review because the Third Circuit has already addressed the question presented in a manner consistent with this Court's earlier expressed views on the subject of state causes of action and ERISA plans.[3]

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[3] *Metropolitan Life Insurance Co. vs. Massachusetts*, 471 U.S. 724; 105 S.Ct. 2380; 85 L.Ed.2d 728 (1985); *Shaw vs. Delta Air*

(Continued on following page)

REASONS FOR DENYING THE WRIT

1. No substantial conflict exists among the Circuit Courts of Appeals on the narrow issue before this Court.

FMC asserts the existence of "a substantial and direct conflict among the Courts of Appeals" as a justification for the issuance of a Writ of Certiorari by this Court. Such a Writ is "granted only when there are special and important reasons therefore." Rule 17.1, Rules of the Supreme Court of the United States. While a genuine conflict between the Courts of Appeals is concededly one of the considerations viewed by this Court, the mere existence of such a conflict in a given case does not control this Court's absolute discretion or justify an exercise of this Court's jurisdiction. Whether in matters of personal liberty or mere dollars, the sheer volume of conflict situations assures that far more of such cases must be rejected than can be heard. See *Brown Transport Corp. vs. Atcon, Inc.*, 439 U.S. 1014 (1978) (Dissenting opinion of Mr. Justice White). Ms. Holliday submits that certiorari should be granted only where the asserted conflict is genuine, widespread and pervasive, and is fundamental to the precise issue placed before the Court in the proffered case.

(Continued from previous page)

Lines Inc., 466 U.S. 85; 103 S.Ct. 2890; 77 L.Ed.2d 490 (1983); *Fort Halifax Packing Co. vs. Coyne*, 482 U.S. 1; 107 S.Ct. 2211; 96 L.Ed.2d 1 (1987); *Pilot Life Insurance Co. vs. Dedeaux*, 481 U.S. 41; 107 S.Ct. 1549; 95 L.Ed.2d 39 (1987); *Mackey vs. Lanier Collection Agency*, 486 U.S. ___, 108 S. Ct. 2182 (1988).

Perhaps in a tacit acknowledgment of this concept, FMC attempts to elevate its voice above the clamor by painting a portrait of pervasive conflict among the Circuit Courts of Appeals upon an issue defined with far greater breadth than may be justified by the facts of this dispute. This case neither demands nor requires the broadstroke ruling sought by FMC as to the tension between the preemption clauses of ERISA and every state insurance law which might, in any conceivable way, someday affect the legal rights of a self-funded employee welfare benefit plan such as FMC's.

Viewed in the light of the true question presented by this case, i.e., the effect of ERISA's preemption clause upon a state motor vehicle insurance law barring certain subrogation claims, the colossus of conflict erected by FMC crumbles. Several of the cases cited by FMC address the viability of state law remedies asserted by Plan participants against self-funded plans. See, *e.g., Powell vs. Chesapeake and Potomac Telephone Co.*, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); *Reilly vs. Blue Cross and Blue Shield United of Wisconsin*, 846 F.2d 416 (7th Cir.), cert. denied, 104 S.Ct. 145 (1988). This Court has left no room for doubt that ERISA proscribes such claims. *Shaw vs. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pilot Life Insurance Co. vs. Dedeaux*, 481 U.S. 41, 95 L.Ed.2d 39, 107 S.Ct. 1549 (1987). Such cases are not pertinent to the analysis of this conflict because Holliday seeks no affirmative relief against a plan fiduciary and asserts no state remedy for benefits under the Plan.

A second cluster of cases cited by FMC involve holdings that state law cannot direct self-insured employee welfare benefit plans to provide certain types of plan

benefits. See, *e.g., Children's Hospital vs. Whitcomb*, 778 F.2d 239 (5th Cir. 1985); *Insurance Board of Bethlehem Steel Corp. vs. Muir*, 819 F.2d 408 (3rd Cir. 1987); *Liberty Mutual Insurance Group vs. Iron Workers Health Fund of Eastern Michigan*, 879 F.2d 1384, re-hearing denied, ___ F.2d ___ (6th Cir. 1989). Far from contributing to a splintering of opinion among the various Circuit Courts of Appeals on the subrogation issue, these decisions simply recognized dicta found in *Metropolitan Life Insurance Company vs. Commonwealth of Massachusetts, et al.*, 471 U.S. 724 (1985), wherein this Court determined the validity of such "mandated benefits" laws as applied to insured plans. These cases did *not* require consideration of the status of state laws affecting attempts by self-insured plans to assert subrogation against the tort recoveries of injured parties. To afford deference to dicta of this Court in a case involving the precise subject matter addressed by this Court in generating such dicta does not create a true conflict with a decision in a wholly different field of regulation.

Finally, FMC cites four decisions relating to the attempted enforcement of Plan subrogation rights in the face of state law which either provides no such right or affirmatively bars them from being asserted. A closer examination of these decisions reveals that the conflict is not so absolute as FMC would have this Court believe. *Baxter vs. Lynn*, 886 F.2d 182 (8th Cir. 1989), is a panel holding that "the (state's common) law of subrogation, while generally applicable to insurance contracts, is not specifically directed to the insurance industry." 886 F.2d at 186. The key factual distinction was the absence in *Baxter* of a state precept geared towards insurance regulation; the Court thus found a law of general application

not to have been saved from preemption by ERISA Section 514(b). The Court was not squarely faced with a state insurance regulation or the "deemer" question which FMC concedes to lie at the core of this appeal. The Panel's comments regarding the theoretical application of the "deemer" clause were mere dicta and are not necessarily indicative of the full Eighth Circuit Court of Appeal's position on the question presented to this Court today.

Two of the remaining decisions were born of exhaustive analyses of congressional intent, concluding that the "deemer" clause was not intended to preempt core provisions of state automobile insurance regulations, even as applied to self-funded plans. *Northern Group Services, Inc. et al. vs. Auto Owners Insurance Co., et al.*, 833 F.2d 85 (6th Cir. 1987), cert. denied 108 S.Ct. 1754 (1988); *FMC Corp. vs. Holliday*, 885 F.2d 79, re-hearing denied ___ F.2d ___ (3rd Cir. 1989). Although FMC's petition stresses the differences in intellectual approaches between the Sixth Circuit and the Third Circuit Courts of Appeals, the nature of the analysis utilized by each Court is in essence identical. Each Court scrutinized Congress' intent in enacting the relevant preemption provisions of ERISA, and concluded that, as to the *particular* type of state automobile insurance regulation before it, Congress did not intend federal preemption to occur because the state provision at issue was not a surreptitious attempt to supplant federal pension regulation with state controls. See *Northern Group Services*, 833 F.2d at 93; *Holliday*, 885 F.2d at 87-90. FMC's complaint that the *Northern Group Services* and *Holliday* Courts created "two different, but equally amorphous, tests" dissipates in the face of the language of the opinions. The *Northern Group Services* Court determined that,

> "where there is no demonstrated interest in national uniformity and preemption of state law which substantially disrupt a state regulatory scheme generally applicable to both insured and self-insured ERISA plans, as well as to insurers generally, the deemer clause does not bar regulation." 833 F.2d at 95.

The *Holliday* Court found that,

> "self-insured plans would merely be considered on a case by case basis as to whether the state regulation involved affects a central concern of ERISA. *Northern Group Services*, 833 F.2d at 94-95. In light of the available interpretive materials, the proper inquiry under the deemer clause is whether the state insurance regulation intentionally or unintentionally addresses a core type of ERISA matter which Congress sought to protect by the preemption provision. The Court, reviewing a state insurance law, should inquire whether that law conflicts with any substitute mandate in ERISA." 885 F.2d at 89-90.

It is impossible to identify any conceptual difference between an "interest in federal uniformity" and a "central concern of ERISA"; these are the same thought variously expressed. It is difficult to fathom any real difference in the aims or approaches of the two Courts, as each is concerned with identification of the congressional intent underlying ERISA. "The purpose of Congress is the ultimate touchstone. (Citations)". *Pilot Life Insurance Company vs. Dedeaux*, 107 S.Ct. at 1552.

Nor does FMC's concern over future litigation justify this Court's attention to the Third Circuit opinion in this case. This Court has previously recognized that, at least in the context of ERISA's civil enforcement provisions, federal courts would have to develop common law to

define rights and liabilities in an ERISA world. *Pilot Life Insurance Company vs. Dedeaux*, 107 S.Ct. at 1557-1558. The judicial development of ERISA rules born of the efforts of federal courts to identify the congressional intent and federal interests underlying a statutory scheme, is to be anticipated given the language of this statute. See *Metropolitan Life*, 471 U.S. at 724.

Ms. Holliday recognizes that the decision of the Ninth Circuit panel in *United Food and Commercial Workers vs. Pacyga*, 801 F.2d 1157 (9th Cir. 1986) is in conflict with the holdings of the *Northern Group Services* and *Holliday* Courts. A brief perusal of it's opinion demonstrates that the *Pacyga* Court, failing to concern itself with congressional intent as this Court and others have done, chose the path of blind application of certain dicta offered in a different context by this Court in *Metropolitan Life Insurance Co. vs. Massachusetts, op. cit.*, and dismissed out of hand any suggestion that the Arizona anti-subrogation law might survive ERISA's preemption provisions. Thus, on the real subject matter of the current controversy, this Court must consider whether the existence of a conflict between two Circuit Courts which have taken parallel paths to the same conclusions and one which has "short-cut" in the opposite direction justifies the extraordinary relief of certiorari.

The magnitude of this conflict dims as the facts of each cited case are illuminated in the background. Total uniformity, while a classroom ideal, is not a species found in the living law. This Court, as it should, has always devoted its energies to serious conflicts. The slight deviation by the Ninth Circuit in *Pacyga* does not warrant the

application of this Court's resources to the Third Circuit's mainstream opinion.

2. The Third Circuit decision is not in conflict with any holding of this Court.

FMC asserts that the Third Circuit has ignored binding precedent created in *Metropolitan Life Insurance Co. vs. Massachusetts*, 471 U.S. 724 (1985). In so doing, FMC incorrectly analyzes the scope of the *Metropolitan Life* holding.

Metropolitan Life resulted from a state court action seeking insurance company compliance with a Massachusetts statute requiring any insurance policies sold within the state to contain certain mental health care coverages. The carriers resisted, arguing that ERISA Section 514 preempted the Massachusetts "mandated benefits" law. The result of this Court's painstaking analysis of Section 514(b) was a holding that the Massachusetts statute was not preempted as to the parties litigating the issue.

Critically, none of the parties to *Metropolitan Life* were a self-funded employee welfare benefit plan. This Court took great care to note that Massachusetts removed the question of mandated benefits laws as applied directly to self-funded plans before that matter could reach the Court. 471 U.S. at 734, n.14. This Court was neither required nor requested to encompass self-funded plans within its holding in *Metropolitan Life*. The language relating to self-funded plans, upon which FMC relies to establish a conflict between this Court and the Third Circuit

Court of Appeals, is dicta. Dicta is neither binding precedent nor part of any holding of this Court. *McDaniel vs. Sanchez*, 452 U.S. 130 (1981).

Moreover, the *Metropolitan Life* dicta must be viewed in the context of the peculiar type of state law then before the Court, i.e. a mandated benefits law. Such dicta has persuasive value, only insofar as it indicates that *mandated benefits laws* should not be applied to self-funded plans. The Pennsylvania anti-subrogation statute, while an insurance statute (as determined by the District Court and the Third Circuit, and as argued by FMC), is of a different character from mandated benefits laws; the former restricts plan efforts to assert a traditional state law remedy, while the latter dictates what coverages a plan administrator must offer. The need to ferret out congressional intent as to the former type of legislation is obvious, as this Court has recognized that preemption is not automatic. *Fort Halifax Packing Co., Inc. vs. Coyne*, 482 U.S. 1 (1987). The Third Circuit's conduct in *Holliday*, far from contradicting this Court's holdings, marches in step with this Court's approach to ERISA preemption as to the type of state enactment to be addressed in this case.

3. Acceptance of jurisdiction over this case will not substantially reduce litigation over ERISA preemption.

FMC asserts a belief that, if this Court accepts jurisdiction and reverses the judgement of the Third Circuit Court of Appeals, endless litigation and diversity of national impact will be avoided. FMC thus proposes that Congress intended to trample upon state regulatory

authority with no discrimination whatsoever and without respect to the maintenance of a federal system of government.

> "ERISA preemption analysis must be guided by respect for the separate spheres of governmental authority presented in our federal system".

Fort Halifax Packing Company, Inc. vs. Coyne, 482 U.S. 1, ___, 107 S.Ct. 2211, 2221 (1987), citing *Alessi vs. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Such sensitivity to the continued existence of a federal system renders inevitable a certain degree of litigation to balance the ongoing tension between federal and state interests. This Court has never suggested that ERISA preemption is absolute; rather, it has continuously examined congressional attitudes and found that Congress recognizes the ongoing right of the states to regulate traditional areas of concern, even where such regulation impacts upon employee welfare benefit plans. See, *e.g., Metropolitan Life, op. cit.; Fort Halifax Packing Company*, 482 U.S. at ___, 107 S.Ct. at 2215; *Mackey vs. Lanier Collection Agency*, 486 U.S. ___, 108 S.Ct. 2182 (1988). Avoidance of adjudication of the bounds between federal and state interplay is simply not a justification for an exercise of this Court's jurisdiction in view of the inherency of this process to our federal system.

The *Mackey* decision perhaps best illustrates this idea. This Court refused, in *Mackey*, to hold that Georgia's scheme for enforcement of civil judgements could not apply to an ERISA plan. In so doing, this Court found Congress to have intended that ERISA plans should be amenable to suit upon various state causes of action.

Mackey, 108 S.Ct. at 2186-2187. In the context of widely varying state laws and causes of action, this finding belies FMC's asserted mandate of absolute uniformity in all matters touching upon all self-funded plans. *Mackey* strongly suggests that Pennsylvania's Section 1720 was intended by Congress to survive Section 514(a), since it not only falls into a class of regulations specifically designated by Congress as ERISA "survivors" (i.e., insurance laws), but also addresses the existence (or non-existence) of a traditional state law claim (i.e., subrogation in conjunction with common law tort actions). Review of the Third Circuit's approval of this statute will, therefore, add nothing to the debate over the scope of ERISA preemption, as the Third Circuit dovetailed with this Court and Congress in finding this statute to be outside the scope of the pretextual sorts of enactments which Congress sought to prevent through the enactment of Section 514. See 885 F.2d at 87-90.

CONCLUSION AND RELIEF

This case is not appropriate for Supreme Court review and, therefore, the subject Petition for Writ of Certiorari should be denied.

January 31, 1990

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